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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. AHMAD KHALIAH MABROK, Defendant and Appellant.	G056251 (Super. Ct. No. 11HF3038) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Reversed and remanded.

Law Offices of Mark S. Devore, Mark S. Devore and Adam R. Stull for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

The issue of the retroactivity of the newly-enacted mental health diversion statute, Penal Code section 1001.36,[1] is now before the Supreme Court. As of mid-September 2019, there are no less than *70* opinions from the Court of Appeal weighing in on the topic. We see no reason in this case to reinvent the wheel; it was a decision from this court, *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, that got the ball rolling in the first place. In this decision our contribution to the ongoing debate will be to address several considerations not dealt with in *Frahs*: (1) the legislative history behind section 1001.36; (2) the impact, if any, of the constitutional prohibition against double jeopardy on the retroactivity question; (3) the theory that the retroactive application of section 1001.36 to cases on appeal at the time of enactment will necessarily be futile; and (4) the idea that retroactive application is impractical in the real world because of the time it normally takes to decide criminal cases on appeal.

II. BACKGROUND

In 2011, Ahmad Mabrok hijacked a white Hummer limousine in Irvine by stopping his Chevy Cavalier in the middle of a street with the hazard lights flashing. When the limousine driver stopped, Mabrok approached and told him he was from the FBI and was commandeering the vehicle. Mabrok got in the passenger door, tried to grab the driver's cell phone and then hit him with his fist. The driver left, and called 911. Mabrok drove off in the limousine, heading up the Santa Ana Freeway toward his brother's house in Whittier. After exiting at the Valley View offramp, Mabrok drove the limousine at a high rate of speed until it entered a residential neighborhood. During the chase he took off his all his clothes. Slowing down by his brother's house, Mabrok got out of the limousine which continued on until it was stopped by a fence. Mabrok was chased down by a police dog.

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[1] All further statutory references are to the Penal Code. All subdivision references are to section 1001.36 of that code.

After his arrest, Mabrok was prosecuted for various crimes associated with the police chase, including carjacking, robbery, and evading arrest while driving recklessly. He defended his actions with claims of mental impairment, testifying that on the night in question he thought California was about to break off into the ocean. He said he felt possessed and disassociated from his body. He was also off his usual anti-anxiety medication. His defense included testimony of a clinical psychologist (Dr. Laura Brodie) who opined he was suffering from bipolar disorder with psychotic features. She noted Mabrok had been smoking marijuana the night in question, and marijuana can cause psychotic episodes in people with bipolar disorder.

On April 5, 2018, the jury rejected his mental impairment defense and found Mabrok guilty of carjacking, evading arrest while driving recklessly, and unlawfully taking a vehicle. Having previously served time in prison in 2010 and 2011 for elder abuse (§ 368, subd. (b)(1)), Mabrok was sentenced to 6 years, 8 months, in state prison. He was sentenced on April 27, 2018, and filed his notice of appeal the same day. About two months later, on June 27, 2018, Governor Brown signed Assembly Bill 1810 (AB 1810) into law, enacting section 1001.36. The statute became effective that day. (Stats. 2018, ch. 34, § 24.)

III. DISCUSSION

A. *The Issue Generally*

Mabrok presents but one issue on appeal: He says section 1001.36 should be applied retroactively to his case because his conviction is not yet final; it is still on appeal. Our decision in *Frahs* would compel exactly that. There, the court noted that section 1001.36 has an "unquestionably . . . 'ameliorating benefit'" for an individual with a diagnosed mental health disorder. (*Frahs, supra*, 27 Cal.App.5th at p. 791, quoting *In re Estrada* (1965) 63 Cal.2d 740, 744 (*Estrada*).) The *Frahs* court reasoned that given

the statute's indubitable ameliorating statutory benefit, the general retroactivity rule laid down by our Supreme Court in *Estrada* and reiterated in *People v. Lara* (2019) 6 Cal.5th 1128 (*Lara*) [Proposition 57 applied retroactively]) would apply. Defendants whose cases were not yet final were entitled to that ameliorating benefit. (*Frahs, supra*, 27 Cal.App.5th at pp. 790-791.) Since the defendant in *Frahs* had been diagnosed with schizoaffective disorder – a combination of schizophrenia and bipolar disorder – the panel conditionally reversed his conviction and sentence and ordered the trial court to conduct a mental health diversion eligibility hearing. (*Frahs, supra*, 27 Cal.App.5th at p. 792.)

Given the strong policy in favor of retroactivity expressed in *Estrada* and *Lara*, we see no reason here to reiterate the analysis set out in *Frahs*. However, the *Frahs* panel did not find it necessary to address the legislative history of section 1001.36. (See *Frahs, supra*, 27 Cal.App.5th at p. 486, fn. 2.) In this appeal the Attorney General asserts the statute's legislative history compels a different result than the one in *Frahs*, so we now confront it.

Section 1001.36 had its genesis in 2018's AB 1810. We agree with the court in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*) [section 1001.36 not retroactive] that AB 1810 was a fiscally-motivated, cost-saving measure. The idea was to save the price of "continuous warehousing of the mentally ill" by "early, court-assisted interventions[.]" (*Craine, supra*, 35 Cal.App.5th at pp. 758-759, quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2.) Such interventions necessarily envision intervention early in the judicial process to avoid the costs of trial and incarceration. (*Ibid.*) Based upon such fiscally-oriented origins, the *Craine* court concluded that retroactive application to those defendants whose convictions are not yet final is "antithetical to the Legislature's goals." (*Id.* at p. 759.)

However, the legislative history of AB 1810 is silent on application to defendants whose convictions are not yet final. It does not necessarily follow that the Legislature was seeking to squeeze the last drop of cost savings by cordoning off the possibility of diversion for defendants on appeal at the time of enactment. Indeed, *some* cost savings are inevitable from the statute's retroactive application to cases not yet final. For example, in a case like Mabrok's where the defendant is sentenced to a relatively long period of time, diversion even at this late stage might yet save the higher cost of formal imprisonment for the period of time after diversion is granted.

Neither the text nor the legislative history of section 1001.37 contains a "clear signal" from the Legislature as to the retroactivity of the newly-enacted diversion statute. (*People v. Weaver* (2019) 36 Cal.App.5th 1103, 1120-1121 (*Weaver*), quoting *Lara, supra,* 6 Cal.5th at p. 1134.) We find this silence dispositive. (*People v. Burns* (2019) 38 Cal.App.5th 776, 786 (*Burns*), quoting *People v. Buycks* (2018) 5 Cal.5th 857, 881 [noting in that in absence of a savings clause, Legislature """ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible"""].) Indeed, when legislative history is silent, the textual result controls. (*People v. Huynh* (2014) 227 Cal.App.4th 1210, 1216 [One Strike Law legislative history was silent on whether qualifying offense had to occur before or after currently charged offense, so unambiguous language of the law requiring qualifying conviction to precede currently charged offense controlled].) And here the textual result, as explained in *Frahs*, is that the *Estrada-Lara* doctrine of retroactivity controls.

Moreover, we cannot say that the Legislature's intent was exclusively to save money. In fact, in section 1001.35 – in which the Legislature expressed itself about

its intention in statutory text – money is not mentioned at all. The focus is actually on the value of diversion as a good thing for the individual defendant.[2] We think the Attorney General takes too much out of *Craine*.

A second point not addressed in *Frahs* that has cropped up in its wake is the issue of double jeopardy. In *People v. Torres* (2019) ___ Cal.App.5th ___ (*Torres*) [2019 Cal.App.LEXIS 850*], our colleagues in Ventura concluded that since jeopardy, for constitutional purposes, attaches when a jury is impaneled and sworn, the Legislature must have wanted to exclude cases on appeal from the ambit of section 1001.36. (See *Torres, supra*, slip op. at p. 5, citing *Larios v. Superior Court of Ventura County* (1979) 24 Cal.3d 324, 329.)

However, we see no logical relationship between jeopardy attaching with the impanelment and swearing of a jury and what the Legislature intended in section 1001.36. It is hard to see how the double jeopardy doctrine is implicated in cases of the *conditional* reversal and remand procedure used in *Frahs*, and then later adopted by the courts in *Weaver, supra*, 36 Cal.App.5th at page 1122 and *Burns*, *supra*, 38 Cal.App.5th at page ____. If the defendant is not given diversion on remand, or if he or she does not successfully complete diversion, the *original* judgment could simply be reimposed without the need for a second trial.

A third point urged by the Attorney General is futility. The theory here is that since a jury has already rejected a mental impairment defense, and the trial judge will likely have taken that rejection into account in passing sentence, retroactive application would be a waste of time. (See *People v. Jefferson* (2019) 38 Cal.App.5th 399, ___

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[2] Section 1001.35 provides in its entirety: "The purpose of this chapter is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders."

(*Jefferson*) [given trial judge's remarks at sentencing hearing, section 1001.36 conditional reversal and remand would be futile].)

The answer to the futility theory point is that the jury's implied finding in a case such as this one – that the defendant was faking it – is not res judicata on the point of whether a given defendant suffers from a Diagnostic and Statistical Manual disorder which makes the defendant eligible for mental health diversion. The most basic fact about section 1001.36 is that the Legislature was willing to entrust the determination of (among other things) the existence of a given defendant's mental order, its treatability and the risk of dangerousness to public safety to the discretion of a trial judge. (§ 1001.36, subd. (b) ["the court may . . . grant pretrial diversion"].) In a case not yet final, we cannot say that the trial judge will simply rubber-stamp the jury's implied finding on a lack of mental impairment.[3] The fact is the judge will not have considered the various requirements for diversion in the *context* of a hearing on diversion. At most, she or he will have uttered comments in a sentencing hearing rejecting application of some leniency based on the defendant's impairment. (See *Jefferson, supra*, 38 Cal.App.5th at p. ___ [quoting judge's comments at sentencing hearing].)

Section 1001.36 necessarily entails a hearing more complex than just looking at whether a trial judge was inclined to believe in mental impairment in the first go-round. For example, subdivision (b)(1)(C) makes the *treatability* of the mental disorder one of the requirements for diversion.[4] But treatability will often require the

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[3] The difficulty of ascertaining mental illness has ancient origins (see I. Sam. 21:13-14 [political rival of king, in a foreign court, fakes insanity to escape extradition]) and is still with us. (See Penhall, *Blue/Orange* (2001) [two psychiatrists in London hospital debate over whether young black man from a council estate is, or is not, truly schizophrenic] at https://www.dramaonlinelibrary.com/plays/blue-orange-iid-142991 [as of Sept. 13, 2019] (*Blue/Orange*).)

[4] "In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment."

expert opinion of M.D. psychiatrists, as distinct from M.S. psychologists, when the issue centers on the efficacy of any given regime of drugs which can only be prescribed by an M.D. We anticipate a series of battles between such experts,[5] and the defendant may win some of them. It follows that conditional reversal and remand is not a waste of time.

Finally, a fourth issue is practicality. The *Craine* court noted that while section 1001.36 puts a two-year ceiling on the diversion process, in the real world criminal appeals take about a year and a third (463 days) to process. (*Craine, supra*, 35 Cal.App.5th at p. 759.) Thus, noted *Craine*, given the Legislature's desire to have mental health diversion cases resolved expeditiously, the inference is the Legislature did not intend the statute to apply to those defendants on appeal at the time of enactment. (*Ibid.*)

We think this point, while considerable, founders on the same shoals that the more general cost-savings argument did. The practicalities of the time spent on appeal hardly represent a *clear* signal the Legislature intended to vary the default *Estrada-Lara* presumption of retroactivity. They may well have penciled out a different saving than we see; they are certainly better equipped for such computations than we are. Nor does it address the focus on the good diversion is intended to do for qualifying individual defendants expressed in section 1001.35.

IV. DISPOSITION

We follow the conditional reversal formula now established in *Frahs*, *Weaver* and *Burns*. The judgment is conditionally reversed and the matter remanded to the trial court to hold a hearing under section 1001.36 to determine whether Mabrok is to be granted diversion under the statute. If so, and if he performs satisfactorily in diversion, the trial court shall dismiss the charges.

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5 A whole play, *Blue/Orange*, was devoted to that very problem.

But if the trial court does not grant diversion, or if Mabrok does not satisfactorily complete the diversion, the trial court shall reinstate the *original* judgment.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.